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Constitutional Law–Military Courts Martial–Trial of Civilians

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CONSTITUTIONAL LAW—MILITARY COURTS MARTIAL—TRIAL OF CIVILIANS.—A and B were wives of American servicemen who accompanied their husbands overseas, and were living on military reservations with their husbands in a dependent status. Each killed her husband and was tried for murder by military court martial. The conviction of each was affirmed by the Supreme Court in a consolidated hearing. *Held*, on rehearing by the Supreme Court, that there was no constitutional basis for extending the jurisdiction of military courts martial to civilians accompanying service members in a dependent status. *Reid v. Covert*, 77 Sup. Ct. 1222 (1957).

The basic issue in the principal case is whether military authority can be extended to civilians accompanying the armed forces. The decision rendered by the Supreme Court is unfortunate from any point of view. There is no unanimity of opinion; the case rationale is well-nigh impossible to discover and great difficulty is anticipated in applying the case to any future decision. This situation is brought about by the fact that the Court, itself, cannot agree as to the result. There is a majority *result*, but no majority opinion. There are four opinions, in fact. One of these might best be characterized as the plurality opinion, and is delimited by two concurring opinions. The fourth opinion is a dissent.

The resultant confusing state of affairs is further muddled by the fact that the opinions reversed the position of the Court delivered 364 days before. It is noteworthy that Mr. Justice Harlan reversed his own stand of the preceding year, on the general ground that he had had more time for reflection in the interim. See *Reid v. Covert*, 351 U.S. 470 (1956).

To advance into specifics, the tempest was aroused by the granting of jurisdiction to military courts in cases arising without the United States involving persons "serving with, employed by, or accompanying" the armed forces. Art. 11(2), Uniform Code of Military Justice; 50 U.S.C. § 552(11) (1949). This may seem, on first sight, like a new provision, but military authorities had power over certain civilians at the time the Constitution was framed. The Articles of War adopted June 30, 1775, provided that, "All sutlers and retailers to a camp and all persons whatsoever, serving with the Continental Army" were subject to that army's regulations. WINTHROP, *MILITARY LAW AND PRECEDENTS* 956 (2d ed. 1920). The problem arising is whether trial of civilians must be by Article III court, *i.e.*, one which is established under the provision of Article III

of the Constitution, in which trial is by jury; and whether the safeguards of the fifth and sixth amendments must follow the civilian.

The Court has held that the above provisions are not necessary in cases arising without the United States. *In re Ross*, 140 U.S. 53 (1890). Although not involving the military, the *Ross* case included the same considerations, although the power in question was consular rather than military. The main opinion of the principal case disposes of the *Ross* case rather summarily, inferring it to be a dead issue, and giving as some basis for this the fact that consular authority to try civilians has been ended. It would be well to point out that the President was given authority to end such consular courts, and did so in 1956, but he was under no compulsion—constitutional or otherwise—to do so. 22 U.S.C. § 141 (1956).

One other line of cases, known collectively as the *Insular Cases*, also allowed trial of civilians in non-Article III courts. *Balzac v. Porto Rico*, 258 U.S. 298 (1921); *Dorr v. United States*, 195 U.S. 138 (1903); *Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1902); *Downes v. Bidwell*, 182 U.S. 244 (1900). These cases arose in the territorial possessions of the United States and the distinguishing factor according to the present Court is that these cases arose under the power of the United States to make laws concerning territories, and the permissive reason was that the territories had been under different systems of law, making it a practical necessity to administer justice under the prior territorial laws. U. S. CONST. art. IV, §3, cl. 2. By the same reasoning, the Court *could* have based a decision in the principal case, contra to that actually rendered, on the power of the United States to govern the military forces. U. S. CONST. art. 1, §8, cl. 14. They chose otherwise. The clause in its entirety states that the government shall have power "To make Rules for the Government and Regulation of the land and naval Forces." The court has recognized that the phrase, "in the land and naval Forces," did not necessarily restrict its application to uniformed personnel. *Johnson v. Sayre*, 158 U.S. 109 (1895). The Court has, at this time, apparently decided to adopt a restrictive view of the power, and give clause 14 a literal interpretation. They imply this *must* be done. It is not too far-fetched to see that if this literal interpretation were necessary, it might take a constitutional amendment for courts martial to try cases arising in the *air* forces, in view of the restriction of the clause to land and naval forces. The Supreme Court had no difficulty in

expanding the scope of federal power in other instances where practicality was a consideration, *e.g.*, the ever-widening scope of the commerce clause. *Cf. Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954).

The principal case would appear to be one where practicality is an overwhelming consideration. In addition to the disciplinary problems posed by lack of control of civilians by military authorities, one prime consideration must be kept in mind: United States citizens are not tried by the United States as a matter of right in foreign countries, but entirely at the indulgence of the other country. The civilian is, for all practical purposes, indistinguishable in the eyes of that country from members of the armed forces *per se*. In this wise, it should be obvious that these countries will remove the privilege of trial from the United States if it is abused. Although the principal case is authority for refusing court martial of civilians in capital cases—or, at most, major cases—its reasoning must be applied to lesser offenses, as well. There are many of these lesser offenses which would not be tried by the United States, if trial in the United States were necessary, due to the logistical problems involved. Clearly, if the United States will not try perpetrators of these offenses, the foreign country will. Further, there are many crimes which would not be tried at all, under such circumstances, as they are not crimes in the other country, *e.g.*, narcotics violations in the Far East.

It appears that the framers of the Constitution had no such qualms about military power as does the present court. There are safeguards, to be sure, but these safeguards are primarily aimed at divesting *executive* authority as to armed forces, and imposing the authority in the *legislative* branch. It was felt that in this manner the abuses felt under British rule would be obviated. *THE FEDERALIST* No. 24 (Hamilton). Lest it be thought that Hamilton's view is of no import, it should be stated that *The Federalist* has been relied on to a great extent in interpreting the Constitution, in recent years as well as the past. *E.g.*, *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109 (1953); *United States v. Pink*, 315 U.S. 203, 230 (1941).

From the foregoing discussion, it appears certain that the Supreme Court could have chosen to allow trial of civilians by court martial, had they so desired. They chose not to do so. Instead, they have left but three alternatives, varying in degree of practicality, but alike in that all are less satisfactory than would be courts

martial. They are: (1) trial in the United States with the attendant logistical problems and, perhaps even more important, lack of authority for demanding the appearance of foreign nationals as witnesses; (2) trial by a foreign country with no guarantee of the safeguards deemed so important to the Court's decision; or (3) no trial by either.

None of the three would appear as satisfactory as trial of civilians by military court martial, which would be administered by citizens of the United States, under United States law, with procedure and safeguards controlled in their entirety by the Congress of the United States.

C. R. S.

CONSTITUTIONAL LAW—OBSCENITY.—This case involves two separate fact situations. In the first *D* was engaged in the publication and sale of books, photographs, and magazines. He was convicted of mailing obscene circulars and an obscene book in violation of the federal obscenity statute. 64 STAT. 194, 18 U.S.C. § 1461 (1950). In the second case, *D* was convicted of keeping for sale obscene and indecent books, and with composing obscene advertisements of them in violation of the State Penal Code. CAL. PENAL CODE ANN. § 311 (West 1955). *Held*, affirming the convictions, that obscenity is not within the area of constitutionally protected speech or press guaranteed by the first and fourteenth amendments. *Roth v. United States*, 77 Sup. Ct. 1304 (1957).

Expressions found in numerous opinions of the Supreme Court demonstrate a tacit assumption that obscenity is not within the area of free press protected by the first and fourteenth amendments. *Beauharnias v. Illinois*, 343 U. S. 250 (1951); *Near v. Minnesota*, 283 U.S. 697 (1930); *Ex parte Jackson*, 96 U.S. 727 (1877). Relying on this premise, the Court in the principal case attempts to compound a test whereby it can determine whether matter is or is not obscene, and consequently does little to clear up the already confused state regarding obscenity. For nowhere in the law has the search for a workable standard encountered more confusion than in the attempt to find a test for determining whether a publication is or is not obscene. Marks, *What Is Obscenity Today?*, 73 U.S.L. REV. 217 (1939).

One of the earliest tests of obscenity was adopted in *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868). It allowed material to be judged